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March 20, 1998

The Honorable Lewis Hall Griffith
The Honorable Jeffrey S. Gulin
The Honorable Edward Dreyfus
c/o Gina L. Giuffreda, CARP Specialist
Office of the Register of Copyrights
Room LM-403
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, D.C. 20540

Re: Noncommercial Educational Broadcasting Compulsory License, Docket No. 96-6 CARP NCBRA

Dear Panel Members:

On behalf of Broadcast Music, Inc. ("BMI"), we submit this letter in opposition to the request of the Public Broadcasting Service and National Public Radio (collectively, the "Public Broadcasters") to admit in evidence the joint proposal of BMI (the "BMI joint proposal") with certain non-profit religious, college and university, and community based radio stations (the "joint radio proposal stations") represented by the National Religious Broadcasters Music License Committee (the "NRBMLC") and the National Federation of Community Broadcasters (the "NFCB") dated October 1, 1997. (A copy of the BMI joint proposal, which was marked for identification as Exhibit PB 17X, is attached.)

The BMI joint proposal should not be admitted in evidence. First, it is not admissible merely because it has been filed with the Copyright Office as the Public Broadcasters argue, because the BMI joint proposal is not relevant or material. Second, contrary to the argument of the Public Broadcasters, section 118 of the Copyright Act does not invite the Panel to consider the BMI joint proposal, because it is not a "voluntary license agreement" under section 118(b)(3).

Third, the BMI joint proposal is an inadmissible settlement which expressly provides that it was submitted on a non-precedential basis and does not reflect the value of music use. Finally, the BMI joint proposal does not fall under the curative inadmissibility doctrine.

1. The BMI joint proposal is not relevant and material.

In their March 19, 1998 letter to the Panel, the Public Broadcasters completely misconstrue the Rules of Evidence in this proceeding set forth in 37 C.F.R. § 251.48. As the Public Broadcasters would seem to read them, the Rules would allow a party to introduce in evidence any document filed with the Copyright Office, regardless of whether the document is irrelevant or immaterial. The Rules, however, are clear that the only evidence which is allowed is that which "is relevant and material." 17 C.F.R. § 251.48(a). The purpose of 17 C.F.R. § 251.48(c), cited by the Public Broadcasters, is merely to avoid unnecesary photocopying by allowing the Panel to consider otherwise relevant and material documents filed with the Copyright Office by merely referring to them without having to attach them.

Since the Public Broadcasters made no reference to the BMI joint proposal in their written direct case, the Public Broadcasters must now show that the BMI joint proposal is somehow relevant and material to this proceeding. The Public Broadcasters have not made and cannot make this showing. It is telling that they do not argue that the joint proposal radio stations are in any way comparable to the NPR stations. The BMI joint proposal only covers non-NPR radio stations which are religious, college and university based or community based -- many of which are small or low power stations. The BMI proposal has nothing to do with stations affiliated with National Public Radio (including the college-based NPR stations), which includes very large stations with many millions of dollars in revenue and large audiences.

If the Public Broadcasters were allowed to introduce the BMI proposal, this would presumably call for the parties to submit evidence to show whether or not these joint proposal radio stations are comparable to the half-billion dollar enterprise of NPR. BMI should not be put to the burden of having to submit proof on a collateral issue which is completely irrelevant.

2. Section 118 of the Copyright Act does not invite the Panel to consider the BMI joint proposal.

The Public Broadcasters have invoked section 118(b)(3) of the Copyright Act as specifically inviting the Panel to consider the BMI joint proposal as a voluntary license agreement. (See March 19, 1998 letter from Jonathan Weiss to the Panel.)

But section 118(b)(3) of the Copyright Act only refers to "the rates for comparable circumstances under voluntary license agreements." The statute makes clear that the CARP may consider "voluntary license agreements," not joint proposals. The BMI joint proposal is not a "voluntary license agreement." (BMI joint proposal at 2.) As the BMI joint proposal states, a joint proposal was submitted with the NRBMLC and NFCB precisely because these organizations could not -- as a practical and legal matter -- enter into a "voluntary license agreement" with BMI. The reasons for this are that neither of these organizations represents all religious, college and university or community based radio stations and neither of these organizations has the authority to bind its members to an agreement. Therefore, rates were merely jointly proposed, which the Librarian of Congress might have (or might not have) adopted for such stations.

3. The BMI joint proposal is an inadmissible settlement which provides that it was submitted on a non-precedential basis and does not reflect the value of music use.

The BMI joint proposal expressly states that it is made on a non-precedential basis and does not reflect the value of music use. Specifically, the BMI joint proposal states that "this proposal is being made on a non-prejudicial and non-precedential basis, to resolve this matter without the necessity for any Copyright Arbitration Royalty Panel ("CARP") hearings or other action. The annual compulsory license fees [BMI is] proposing do not reflect any assessment by any party of the absolute or relative value of the right of performance of music in the BMI repertory by Community Radio Stations." (BMI Joint Proposal at 3.)

It would be inequitable not to allow BMI to rely on this bargained-for provision in this proceeding by permitting the Public Broadcasters to introduce the BMI joint proposal in evidence. Moreover, as a matter of policy, the effect of permitting the introduction of the BMI joint proposal in evidence would be to discourage settlements in the future. See, e.g., Fed. R. Evid. 408 and Advisory Committee Notes (addressing inadmissibility of settlement agreements).

It would be one thing to allow the BMI joint proposal for the limited purpose of showing that BMI bargained for and received a no-precedent clause in another agreement. It would be quite another thing to allow the BMI joint proposal in as substantive evidence of the rates that the Public Broadcasters ought to be charged. The latter would be directly contrary to the letter and spirit of the rule against allowing settlement agreements into evidence: BMI and others would be less likely to settle in the future with a particular party if it anticipated that the terms of the settlement which are specifically made to be non-precedential would be used against it in a proceeding involving an unrelated party.

4. The BMI joint proposal does not fall under the curative inadmissibility doctrine or any other doctrine.

The Public Broadcasters also assert that BMI's position is contradicted by BMI's own purported use of the BMI joint proposal in its direct case through the testimony of Frederic Willms. The Public Broadcasters' assertion is wrong. In his testimony at page 26, footnote 21, Mr. Willms states only that BMI is "proposing rates in this proceeding jointly with the [NRBMLC] and the [NFCB] for certain small non-profit 'community' radio stations unaffiliated with NPR [and that] BMI is proposing to continue the rate for college and university radio stations, unaffiliated with NPR, subject to an annual cost of living increase." BMI has not advocated reliance on the BMI joint proposal in making its license fee proposal with respect to NPR. Rather, through the footnote in Mr. Willms' testimony, BMI was merely advising the Copyright Office that BMI was making a joint proposal as to non-commercial broadcasters — which might otherwise have been part of this contested proceeding —in order to explain why BMI was not making a fee proposal as to those parties in the body of Mr. Willms' testimony. That notification does not support admitting the BMI joint proposal in evidence as to the Public Broadcasters which are parties here.

Respectfully submitted,

Michael E. Salzman

Michael E. Salzman

cc: R. Bruce Rich, Esq.
Philip Schaeffer, Esq.

Before the
UNITED STATES COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of:	Docket No. 96-6 CARP NCBRA
Adjustment of Rates for Noncommercial Educational Broadcasting Compulsory Licenses	

JOINT PROPOSAL OF BROADCAST MUSIC, INC., THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE, AND THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

Broadcast Music, Inc. ("BMI"), the National Religious Broadcasters Music License Committee ("NRBMLC"), and The National Federation of Community Broadcasters ("NFCB") join in a proposal to establish royalty rates pursuant to 17 U.S.C. § 118 for the payment of compulsory royalties by certain noncommercial radio broadcasting entities (the "Community Radio Stations") which are neither college or university educational broadcasters, nor members of the Public Broadcasting Service or National Public Radio, for the performance of copyrighted musical compositions in the BMI repertory.

BMI, NRBMLC, AND NFCB

BMI is a performing rights organization which licenses the nonexclusive right to perform publicly the copyrighted musical compositions of its writer and publisher affiliates. BMI also represents copyrighted works controlled by various foreign performing rights societies.

NRBMLC represents, among others, noncommercial educational radio broadcasters that are associated as members of the National Religious Broadcasters.

NFCB is a national membership organization representing independent, community-based public radio groups and associated college and university noncommercial radio stations, independent radio producers, and state-wide networks and associations. NFCB frequently represents its members on matters of public policy, and joins in this proposal on behalf of its community-based (i.e., noninstitutional) radio licensee members, which form the majority of NFCB's full members.

THE PROPOSAL

In the past two Section 118 rate proceedings before the Copyright Royalty Tribunal ("Tribunal"), BMI, NRBMLC, and NFCB resolved their differences by agreement and submitted a Joint Proposal, which was adopted by the Tribunal. The form of a Joint Proposal was used in lieu of a voluntary settlement agreement because NRBMLC and NFCB did not represent all of the Community Radio Stations and did not have the authority to bind their members.

BMI, NRBMLC, and NFCB have again reached agreement and submit this Joint Proposal. For the same reasons as before, a Joint Proposal is submitted in lieu of a voluntary settlement agreement. However, as no other representatives of any Community Radio Stations have appeared in this proceeding, the proposed rates should serve to terminate any controversies in this area.

BMI, NRBMLC, and NFCB propose a modification of the rates contained in 37 C.F.R. § 253.6(c)(2), as follows:

For all such compositions in the repertory of BMI,

in 1998	$375
in 1999	$390
in 2000	$405
in 2001	$420
in 2002	$440

This proposal is being made on a nonprejudicial and nonprecedential basis, to resolve this matter without the necessity for any Copyright Arbitration Royalty Panel ("CARP") hearings or other action. The annual compulsory license fees we are proposing do not reflect any assessment by any party of the absolute or relative value of the right of performance of music in the BMI repertory by Community Radio Stations. Accordingly, we ask that the Librarian recognize this in the terms set forth in prior determinations of the Tribunal, namely that "in [adopting] the joint proposal, the [Librarian] recognizes that the joint proposal does not reflect any assessment by any of the parties of the absolute or relative value of the right of performance of music in the [BMI] repertory by community radio stations," 57 Fed. Reg. 55,496 (Nov. 19, 1992), and publish a final determination to that effect in the Federal Register.

CONCLUSION

BMI, NRBMLC, and NFCB request that the CARP and the Librarian adopt their joint proposal, and terminate that portion of these proceedings which relates to the royalty rates payable to BMI by the Community Radio Stations.

Respectfully submitted,

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THE NATIONAL RELIGIOUS BROADCASTERS MUSIC LICENSE COMMITTEE

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Its Counsel

THE NATIONAL FEDERATION OF COMMUNITY BROADCASTERS

By: Lynn Chadwick/BGT
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October 1, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of October, 1997, I caused copies of the foregoing "Uncontested Proposal of the NRB Music License Committee Regarding Recording Rights Under 37 C.F.R. § 253.7(B)(4)", "Joint Proposal of SESAC, Inc., The National Religious Broadcasters Music License Committee, and The National Federation of Community Broadcasters," and "Joint Proposal of Broadcast Music, Inc. and the National Religious Broadcasters Music License Committee" to be served via UPS Overnight Delivery to the following:

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